No. 06-984

IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

AMICUS CURIAE BRIEF OF CONSTITUTIONAL AND INTERNATIONAL LAW SCHOLARS IN SUPPORT OF RESPONDENT STATE OF TEXAS

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INTEREST OF *AMICI*

Amici are scholars who teach and write about constitutional and international law.[1] Erwin Chemerinsky is Alston & Bird Professor of Law and Professor of Political Science at Duke Law School, where he teaches Constitutional Law and Federal Courts. John Eastman is Dean and Donald P. Kennedy Chair in Law at Chapman University School of

[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), letters of consent from both parties to the filing of this brief have been filed with the Clerk.

Law, where he teaches Constitutional Law. Thomas Lee is Professor of Law at Fordham University School of Law, where he teaches Constitutional Law, Federal Courts, and International Law. Michael Ramsey is Professor of Law at the University of San Diego School of Law, where he teaches Constitutional Law and Foreign Relations Law. Michael Van Alstine is Associate Dean and Professor of Law at the University of Maryland School of Law, where he teaches International Law. Arthur Mark Weisburd is Martha M. Brandis Professor of Law at the University of North Carolina School of Law, where he teaches International Law. John Yoo is Professor of Law at Boalt Hall School of Law, the University of California at Berkeley, where he teaches Constitutional and International Law. Ernest Young is Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law, where he teaches Constitutional Law, Federal Courts, and Foreign Affairs Law. Each of us has written about the issues of executive authority, judicial power, or federalism raised by this case.[2]

The signatories of this brief represent a wide range of perspectives on executive authority and judicial federalism. But we all agree that there must be some limits on the power of the President to act unilaterally with the preemptive force of federal law, as well as on the power of the national political branches to interfere with the operation of the state courts. We also agree that, on any plausible view of those limits, the President has transgressed them in this case. Although we appreciate the difficult position that the International Court of Justice has placed the President in with respect to Mr. Medellin's case, our Constitution frequently constrains the means available to pursue even the most commendable ends. Upholding the President's action here

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[2] We file this brief in our personal capacities as scholars; none of our respective universities takes any position on the issues in this case.

would set a dangerous precedent both for Executive authority and for judicial independence.

SUMMARY OF ARGUMENT

This odd case raises fundamental questions about the Executive's authority vis-á-vis Congress and the authority of the national political branches vis-á-vis the state courts. Construing the President's terse and cryptically worded "Memorandum for the Attorney General" as a mandatory directive to the state courts, the United States asserts a unilateral executive authority to preempt neutral state-law limitations on the jurisdiction of the state courts. Such an action would not execute any current international agreement, because the United States has conceded that neither the Vienna Convention on Consular Relations, the Optional Protocol to that agreement, nor the *Avena* judgment of the International Court of Justice require domestic courts to set aside their ordinary rules of procedural default in cases where a foreign national belatedly raises an objection under the Convention. Instead, the President seeks to act unilaterally, asserting that the Memorandum has preemptive effect analogous to that of an Executive Agreement—but without any such agreement. The better analogy is that the President seeks to make a non-self-executing international obligation—the *Avena* judgment—have direct domestic effect, but our law of treaties plainly contemplates that *Congress* must implement non-self-executing international obligations, unless the obligation falls within Executive authority that the President would otherwise possess apart from the agreement. Finally, and most importantly, federal intervention in state criminal proceedings is an area that Congress has delegated to the federal *courts* under the *habeas* statute, which is itself a product of finely calibrated legislative compromise. Executive action to interfere with state court judgments in ways that federal courts could not, because of established limits on their *habeas* jurisdiction, thus falls within the disfavored category

under Justice Jackson's tripartite framework in the *Steel Seizure Case*.

This case also raises fundamental questions of judicial independence. While this Court has held that state courts must hear federal claims if they have jurisdiction adequate to do so, *Testa* v. *Katt*, 330 U.S. 386, 394 (1947), it has never held that this obligation requires a state court to disregard a neutral and general limitation on its jurisdiction. Conversely, by directing state courts to resolve difficult questions concerning their jurisdiction to review defaulted Vienna Convention claims in favor of granting the "review and reconsideration" ordered by *Avena*, the Memorandum unconstitutionally seeks to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146 (1871). And by requiring the state courts to reopen final judgments concerning the *Avena* prisoners, the Memorandum violates the principle of finality established in *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), and *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Although this Court has developed the *Klein* and *Plaut* principles in cases concerning the federal judicial power under Article III, we submit that judicial independence in the resolution of federal claims is no less important in the context of state adjudication. Moreover, the United States has advanced no limiting principle that would confine the President's authority, if upheld here, to interference with *state* courts.

This case is odd because of the mismatch between the fundamental constitutional issues raised by the United States' position and the form and wording of the President's Memorandum itself. That Memorandum is not actually directed to the state courts, it contains no mandatory language, and it speaks instead of "comity." Nothing in it purports to reverse the Executive's position in the *Breard* case, which was that the President possessed only authority to *request* state

officials to heed an ICJ judgment on a Vienna Convention claim—not to compel a halt to an execution. We therefore urge the Court to avoid the constitutional issues presented in this case and interpret the Memorandum as a request that state courts employ all available measures to comply with the *Avena* judgment.

ARGUMENT

I. THE PRESIDENT LACKS CONSTITUTIONAL AUTHORITY TO ISSUE THE ORDER.

As Justice Kennedy recently affirmed, "[t]he proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 . . . (1952)." *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749, 2800 (2006) (Kennedy, J., concurring in part). Because the President's Memorandum falls outside the President's unilateral power to act and runs contrary to the expressed intent of Congress to carefully limit and calibrate federal interference with state criminal proceedings, the President's action here is invalid.

A. The Memorandum Embodies a Discretionary Judgment, Not the Implementation of Pre-Existing Law.

Although the United States seeks to characterize the President's Memorandum as implementing requirements of the Optional Protocol to the Vienna Convention and the United Nations Charter, see Brief of United States, at 8-9, that view contradicts the clear positions taken by the United States in this and similar litigation. Although the Vienna Convention on Consular Relations binds all U.S. courts, the United States has endorsed this Court's holding in *Sanchez-Llamas* v. *Oregon*, 126 S.Ct. 2669, 2682-88 (2006), that the treaty obligation does not override ordinary rules of pro-

cedural default. Brief of United States, at 27-29. Likewise, the United States has endorsed the further holding of *Sanchez-Llamas* that the ICJ ruling in *Avena* itself is not binding on United States courts. See 126 S.Ct., at 2683-2685; Brief of United States as Amicus Curiae (in the Texas Court of Criminal Appeals), at 35-43 (concluding that "an ICJ decision is not privately enforceable").[3]

This means that when the President acts to require domestic courts to comply with the *Avena* ruling and set aside their own rules of procedural default, he is not enforcing a requirement of either *Avena* (which does not bind those courts) or the treaty (which permits application of procedural default).[4] The Memorandum instead represents a discretionary judgment that, in order to further certain foreign policy interests, the state courts should be required to do something more than *Avena* or the treaty require. That judgment is no more an adequate basis for presidential lawmaking than President Truman's judgment that national security required seizure of the nation's steel mills.[5]

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[3] See also *Breard* v. *Greene*, 523 U.S. 371, 375-376 (1998) (per curiam). The United States also agrees with Texas that Medellin on his own may not invoke rights created by Article 36 of the Vienna Convention, because that article by itself does not create rights privately enforceable in United States courts. See, *e.g.*, Brief of United States as Amicus Curiae (in the Texas Court of Criminal Appeals), at 35-43 ("Article 36 does not give a foreign national a private right to challenge his conviction and sentence based on an alleged denial of consular assistance.").

[4] The U.N. Charter adds nothing to the argument, as it only requires compliance with the Vienna Convention and the *Avena* judgment.

[5] Chief Justice Vinson's dissent in *Youngstown* did invoke the U.N. Charter as a basis for President Truman's action, much as the President invokes that treaty here. See 343 U.S., at 668-669.

B. The President Cannot Unilaterally Create Supreme Federal Law.

The Executive has previously conceded that it lacks the power to compel the States to ignore state criminal law in circumstances like these. In *Breard* v. *Greene*, 523 U.S. 371 (1998), the Justice Department argued in its brief that the President's only power over the States in circumstances like these was the power to persuade, not the power to compel:

> "[T]he measures at [the United States'] disposal are a matter of domestic United States law, and our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The "measures at [the United States'] disposal" under our Constitution may in some cases include only persuasion—such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution—and not legal compulsion through the judicial system. That is the situation here."

Brief of United States in *Breard v. Greene*, at 51. This Court's opinion in *Breard* appeared to agree that the President's options were limited to "diplomatic discussion[s] with Paraguay" and "a letter to the Governor of Virginia requesting that he stay Breard's execution." *Breard*, 523 U.S., at 378.

That the President's power to interfere with State law in these circumstances is limited to the power of persuasion is consistent with the text of the Supremacy Clause, which does not contemplate a unilateral executive power to preempt state criminal law but rather recognizes only the Constitution, federal statutes, and treaties as sources for valid, supreme federal law. See U.S. Const., Art. VI, cl.2.[6] As Justice Black

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[6] Executive agencies exercising delegated powers may preempt state law, see *Fidelity Fed Sav & Loan Assn* v. *de la Cuesta*, 458 U.S. 141, 153-154 (1982), but the United States points to no such delegation here.

observed in the *Steel Seizure Case*, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S., at 588. Yet the President's Memorandum would override state criminal law and rewrite it by replacing the Texas procedural-default rule with one issued unilaterally by the President. The Constitution does not grant the President that kind of unilateral authority.

The United States seeks to justify the President's order by resorting to the Executive's independent authority to act in matters relating to foreign affairs, but that authority does not encompass unilateral preemption of state criminal law. Rather, the President's foreign-affairs power has been recognized as authorizing him to enter into executive agreements with foreign nations, and this Court has held that such agreements will at least sometimes preempt state law. See, *e.g.*, *American Ins. Assn* v. *Garamendi*, 539 U.S. 396, 415 (2003); *Dames & Moore* v. *Regan*, 453 U.S. 654, 669-670 (1981); *United States* v. *Pink*, 315 U.S. 203 (1942); *United States* v. *Belmont*, 301 U.S. 324, 326 (1937). Those cases do not cover the present circumstances, however. The relevant agreements between the United States and Mexico are the Vienna Convention and its Optional Protocol, but as we have already discussed, neither of those sources of law mandate what the Memorandum requires. The Memorandum is a unilateral act of executive authority.

Moreover, all of the executive-agreement cases have involved the narrow circumstance of a Presidential agreement to settle civil claims of American nationals against a foreign government. See *Garamendi*, 539 U.S., at 436-438 (Ginsburg, J., dissenting) (stressing the narrowness of the relevant decisions). As Justice Souter was careful to point out in *Garamendi*,

> "Making executive agreements to settle claims of American nationals against foreign governments is a

> particularly longstanding practice, the first example being as early as 1799 . . . . Given the fact that the practice goes back over 200 years [to the first Presidential administration,] and has received congressional acquiescence throughout its history, the conclusion that the President's control of foreign relations includes the settlement of claims is indisputable."

539 U.S., at 415 (internal quotations omitted). This Court has never accorded preemptive effect to an executive agreement outside this narrow context—much less an agreement that intrudes into the State's sovereign authority to enforce its criminal law. Compare *id.*, at 425 (stressing "the weakness of the State's interest, against the background of traditional state subject matter") with *United States* v. *Morrison*, 529 U.S. 598, 617 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."). Given the closely divided court in *Garamendi*, the narrowness of the cases on which it relied, and the evident tension of according full preemptive effect to sole executive agreements with a Supremacy Clause that mentions only treaties, this Court should hesitate to extend the reach of that decision.

The United States' position in this case, however, would wholly disregard the key limit preserved in even the broadest possible reading of *Garamendi*—that is, the presence of a bilateral agreement. See Brief of United States, at 23. But that limit is the only stopping point remaining, if this broad reading of *Garamendi* were adopted, before holding that the President's discretionary determinations have the force of law. The Constitution generally imposes difficult procedural hurdles upon the making of supreme federal law, U. S Const., Art. I, §7, and this Court has rejected pleas that these hurdles may be circumvented in the name of efficiency and good policy. See, *e.g.*, *Clinton* v. *City of New York*, 524 U.S. 417, 448-449 (1998); *INS* v. *Chadha*, 462 U.S. 919, 952, 956-959

(1983). *Garamendi* watered down those safeguards by analogizing a sole executive agreement to a treaty, which must be ratified by a Senate by supermajority vote, but adopting the President's position would eliminate those safeguards entirely. This Court should not mistake *Garamendi*'s exception for the rule that the formal requirements of federal lawmaking are to be respected.

Nor are those requirements without practical value. In particular, sole executive agreements must be reported to Congress under the Case-Zablocki Act, 1 U.S.C. §112(b) (2004), and they generally receive far more scrutiny than unilateral statements of executive policy. By contrast, the odd form of the President's Memorandum is likely attributable to a desire to avoid a public debate on interference with the Texas death penalty at the behest of an international court.

Acknowledging the unilateral power claimed by the President to override state law would give the President an essentially unlimited ability to preempt state law based on the assertion of a foreign-affairs interest. For example, the President could pardon state prisoners—notwithstanding the textual limitation of his pardon power to crimes against the United States, see U. S. Const., Art. II, §2—if doing so would, in his opinion, advance the Government's foreign-policy objectives. Thus, according to the United States, when Texas prepared to execute Karla Faye Tucker in 1998, the President could have halted that execution, overriding state law, because there was a widespread outcry from foreign governments and human rights organizations. See *e.g.*, Resolution on the Death Sentence Passed on Karla Faye Tucker in the United States, 1998 O.J. (C 34) 168 (resolution of the European Parliament strongly condemning the execution). Similarly, the President could preempt state environmental policies aimed at combating global warming if, in his view, the existence of such policies undermined the

United States' position in negotiations with other nations that such policies are infeasible.

In sum, the President's position, if accepted, would afford the Executive a practically unfettered power to override state law based on his mere assertion that preemption serves the foreign policy interests of the United States or somehow relates to a valid treaty. That view of a sweeping Presidential power is unsupported by the constitutional text, and goes far beyond what any previous case has recognized.

C. The President Cannot Legislate to Execute Non-Self-Executing Treaties.

The radical implications of the President's position here are most clearly revealed in the United States' argument that, "when the President acts pursuant to a duly ratified treaty and his own constitutional authority, he acts with the full authority of the United States, and his authority is at its zenith. . . . Presidential action that is expressly or implicitly authorized by a treaty is akin to Presidential action that falls within the first category [under *Youngstown*]." Brief of United States, at 10. As we have noted, the United States has consistently affirmed that obligations imposed by the Optional Protocol and the *Avena* decision are not self-executing. *Id.*, at 28-29. Thus, what the President claims is the authority to decide when and how non-self-executing treaty obligations should be executed, without going to Congress for implementing legislation.

The initial decision whether a treaty is to be self-executing belongs to the treaty makers—that is, the President *with the concurrence of the Senate*. See Restatement (Third) of the Law of Foreign Relations §111 (1987). Courts have thus looked to the intent not only of the President but also of the Senate in determining whether a treaty is self-executing.[7]

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[7] See, *e.g.*, *Igartua-De La Rosa* v. *United States*, 417 F.3d 145, 150 (CA1 2005) (en banc) (looking to "the joint position of the President and

This Court has already determined that decisions of the ICJ are not binding on United States courts, *see Sanchez-Llamas*, 126 S.Ct., at 2683-2685, and the United States concedes that, when it ratified the Vienna Convention and its Optional Protocol, the Senate understood ICJ judgments under that protocol to be non-self-executing. Brief of United States, at 26-27; see also Brief of Texas in Opposition, at 22-24 (canvassing the ratification histories of the U.N. Charter and the Optional Protocol).

Since the Optional Protocol and the U.N. Charter are not self-executing, the question is whether the President's Memorandum can execute them unilaterally. It cannot. The President may execute non-self-executing treaties by actions within the scope of his executive authority—e.g., by withdrawing troops from a disputed territory under his commander-in-chief power or refraining from engaging in torture. But the President may not execute a treaty by doing something that he would not otherwise be empowered to do—that is, in a way that requires legislation. Cases involving non-self-executing treaties thus generally refer to them as requiring execution *by Congress*.[8] The decision to execute a

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the Senate that a treaty is not self-executing"); *Beazley* v. *Johnson*, 242 F.3d 248, 267 (CA5 2001) ("The Senate's intent was clear—the treaty is not self-executing.").

[8] See, *e.g.*, *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect."); *Foster & Elam* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (observing that non-self-executing treaties function as contracts between nations, "and the legislature must execute the contract before it can become a rule for the Court"); *Igartua-De La Rosa*, 417 F.3d, at 150 (observing that non-self-executing treaties "are not domestic law unless Congress has . . . enacted implementing statutes"); *Beazley*, 242 F.3d, at 267 ("Non-self-executing means that absent any further actions by the Congress to incorporate them into domestic law, the courts may not enforce them."); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (CA7 1985) ("[T]reaties made by the United States are the law of the land, U.S. Const. art. VI, but if not implemented

non-self-executing treaty is thus not generally one that the President may make unilaterally. As Judge Boudin recently pointed out, "[w]hen the President negotiates . . . a non-self-executing treaty, and when Congress refuses to adopt implementing legislation for a non-self-executing treaty, both are performing functions entrusted to them by the Constitution." *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (CA1 2005) (en banc).

There is very good reason to uphold this limitation on the President's power. Given the vast range of non-self-executing treaties to which the U.S. is a party, holding that the President may take legislative action to execute any of them would have radical consequences. The Senate ratified many of these treaties subject to explicit reservations that they were non-self-executing,[9] but those reservations would hardly protect the Congress's legislative prerogatives if the President could act unilaterally and with the force of law to execute a non-self-executing treaty. There is no principled difference, moreover, between allowing the President to override such an explicit reservation and allowing the President to execute unilaterally a treaty, like the Optional Protocol, that the Senate originally understood to be non-self-executing at ratification. The President's position here intrudes upon Congress's control over implementing legislation and, in the process, vastly extends the scope of his own power.

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by appropriate legislation they do not provide the basis for a private lawsuit unless they are intended to be self-executing...").

[9] See, *e.g.*, Comm. On Foreign Relations, International Covenant on Civil Rights, S. Exec. Rep. No. 102-123, at 9, 19, 23 (1994); Comm. on Foreign Relations, Covenant Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Exec. Rep. No. 101-130, at 30-31 (1992).

D. The President's Order is Contrary to the Will of Congress as Expressed in the *Habeas* Statute.

This case involves federal intervention in state criminal proceedings to secure federal rights. This is not, to put it mildly, unexplored territory. Rather, such intervention has been the subject of extensive Congressional regulation since 1867 under the *habeas corpus* statute. See Act of Feb. 5, 1867, 14 Stat. 385 (extending federal *habeas* to cover persons in state custody). That statute and its subsequent amendments represent an intricate and carefully calibrated set of legislative compromises; likewise, judicial interpretations of that statute have carefully balanced the need to enforce federal rights with the imperative to avoid undue interference with state judicial processes. The President's action here, however, runs roughshod over these particular balances and, more broadly, over Congress's judgment that the federal *courts* are the appropriate institution to supervise state court enforcement of federal rights. By requiring the state courts to reopen a state conviction in circumstances in which the United States concedes that the *habeas* statute would forbid *federal* courts to intervene, the President's action is *contrary* to the will of Congress and thus falls within *Youngstown*'s most disfavored category of executive action.

To the extent that the Federal Government has power to interfere with state criminal proceedings, that authority derives from powers specifically vested in Congress: the power to enforce federal constitutional rights, U. S. Const., Amdt. 14, §5, to regulate the jurisdiction of the federal courts, *id.* Art. III, §1, and to regulate the writ of habeas corpus specifically under the Suspension Clause, *id.* Art. I, §9; *Ex parte Bollman & Swartwout*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F.Cas. 144 (CCD Md. 1861). Congress has exercised that power by drafting statutes to govern the granting of writs of *habeas corpus* to prisoners in

custody because of a state-court judgment. Congress comprehensively reassessed the question of federal intervention in state criminal proceedings in the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. The AEDPA amended the federal *habeas* statute to set out detailed and strict conditions for when a federal court may intervene to reopen state criminal proceedings.

Four specific aspects of the statutory *habeas* regime are most relevant here. First, Section 2254(b)(1) requires the petitioner to exhaust state remedies. The doctrine of procedural default, barring a federal court from hearing a claim that was not properly raised before the state courts and can no longer be raised there, simply enforces the exhaustion requirement. By seeking to override Texas's own rules of procedural default barring state collateral review of Medellin's claim, the President attacks rules with which Congress not only chose not to interfere, but which Congress and the federal courts also built into the federal *habeas* regime.

Second, Section 2254(d)(1) forbids federal *habeas* relief unless the state court's judgment was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." This provision designates this Court, not the President, as the primary guarantor of federal rights in state criminal proceedings. Moreover, this Court has plainly held that the Vienna Convention does not require state courts to set aside their rules of procedural default. See *Sanchez-Llamas*, 126 S.Ct., at 2682-2688. The President's action here thus interferes with Congress's commitment of authority to this court to construe the federal rules binding on state courts.

Third, Section 2254(e)(2) restricts the ability of a federal court to hold an evidentiary hearing on a federal claim when the federal petitioner has not developed the factual basis for his claim in state court. The *Breard* Court cited this provision

as trumping any claim that the Vienna Convention requires federal courts to set aside ordinary rules of procedural default and allow presentation of treaty claims outside the ordinary *habeas* rules. See *Breard*, 523 U.S., at 376.

Fourth, the AEDPA sharply limits the extent to which federal *habeas* courts can consider treaty claims like Medellin's. Federal rights under treaties fall within the initial *habeas* jurisdiction of the district courts, but a district court ruling is available only if a circuit justice or judge issues a certificate of appealability. 28 U.S.C. §2253(c)(1). Such an certificate may issue, moreover, "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). When Medellin's case was previously before this Court, the United States argued that this plain language excluded appeals from the denial of relief on grounds arising from a treaty. Brief of United States as *Amicus Curiae* in Support of Respondent in No. 04-5928, *Medellin* v. *Dretke*, at 13-15 (Feb. 2005). The point, of course, is not that this provision bars review in the present posture but rather that Congress has carefully limited the extent to which federal courts can reopen a state conviction on treaty grounds. The President's Memorandum runs contrary to that limitation.

These specific provisions simply emphasize what the whole history of *habeas corpus* in this country shows: Congress has pervasively regulated the scope and limits of federal interference with state court convictions. The President's Memorandum undertakes to reopen a state conviction in circumstances under which a federal court would plainly lack power to act. The fact that Congress has never anticipated such executive interference—and hence never sought to forbid it explicitly—can be of little comfort to the United States. Congress has made clear that the federal courts are its chosen instrument for supervising the state judiciaries, and the President is no more entitled to usurp that role than he is

to cast aside the specific limitations that Congress has placed on its exercise

Nor can Congress's ratification of the Vienna Convention in 1969 give the stamp of congressional approval to the President's action. The Supreme Court has made clear that a Vienna Convention claim, like all claims based on federal law, is subject to the restrictions imposed by the AEDPA:

> "[A]lthough treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply. . . The Vienna Convention . . . has continuously been in effect since 1969. But in 1996, . . . Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). . . . Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be."

Breard, 523 U.S., at 376. Medellin's Vienna Convention claim, too, is subject to the AEDPA limitations, which he cannot overcome. The President's Memorandum, if read as an order, attempts an end-run around those AEDPA restrictions, and so puts the President into conflict with the will of Congress.

Because the President's Memorandum is contrary to the will of Congress, a mandatory reading of that Memorandum describes an order that falls into *Youngstown's* third category, where the President's power is at its "lowest ebb" and his claims of wide authority "must be scrutinized with caution." *Youngstown*, 343 U.S., at 637-638 (Jackson, J. concurring). The United States can cite to no Supreme Court decision upholding presidential action under these circumstances. Cf., *e.g.*, *Dames & Moore*, 453 U.S., at 680 ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.").

II. THE PRESIDENT'S ORDER UNCONSTITUTIONALLY INTERFERES WITH THE INDEPENDENCE OF STATE COURTS.

The President's Memorandum not only exceeds the bounds of Executive authority vis-á-vis Congress, it also contravenes fundamental principles of judicial independence and federalism. Although historical practice establishes a limited Presidential authority to stay or resolve claims pending in domestic courts as an adjunct to his authority to recognize foreign governments, *see supra* Part I, we are aware of no prior instance in which the President has sought to compel state courts to exercise jurisdiction they do not have, mandate a particular resolution of a key issue in a particular set of cases, or reopen final judgments. And we can see no principled reason why, if the President can do these things to the state courts, he may not exert similar powers over Article III tribunals.

A. The President May Not Require State Courts to Exercise Jurisdiction That They Do Not Possess Under State Law.

In *Testa* v. *Katt*, 330 U.S. 386 (1947), this Court held that the state courts ordinarily may not decline to hear federal causes of action, even if those causes of action run contrary to state policy. The Court was careful to note, however, that the state court enjoyed "jurisdiction adequate and appropriate under established local law to adjudicate this action." *Id.*, at 394. Other cases in this vein, both before and after *Testa*, have likewise qualified the state courts' obligations to enforce federal law by noting that the federal claim did not fall outside the state court's preexisting jurisdiction.[10] As the

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[10] See, *e.g.*, *Howlett* v. *Rose*, 496 U.S. 356, 369 (1990) (noting that "a state court may not deny a federal right, *when the parties and controversy are properly before* it, in the absence of a 'valid excuse'") (emphasis added); *Mondou* v. *New York, New Haven & Hartford R.R. Co.*, 223 U.S.

Court made clear in *Howlett* v. *Rose*, 496 U.S. 356, 372 (1990), "[t]he requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented."[11]

Henry Hart's observation a half-century ago continues to state the norm in our federal system: "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954).[12] There are two exceptions to this principle that may require a state court to apply federal *procedures* when hearing a federal claim. It is not at all clear that either exception could warrant an extension of state *jurisdiction* not authorized by state law. In any event, neither exception applies to this case.

1, 56 (1912) (holding that rights under the Federal Employer's Liability Act were enforceable in state court, but noting that Congress had not attempted "to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure"); *Claflin* v. *Houseman*, 93 U.S. 130, 137 (1876) (holding that federal rights of action are enforceable in state court, so long as the state court is "competent to decide rights of the like character and class"); see also *Alden* v. *Maine*, 527 U.S. 706, 752 (1999) (describing *Testa*'s holding as applying to "state courts of 'adequate and appropriate' jurisdiction").

[11] See also *Minneapolis & St. Louis R.R. Co.* v. *Bombolis*, 241 U.S. 211, 222 (1916) (rejecting the idea that the state court's duty to enforce federal law "depended upon the conception that for the purpose of enforcing the [federal] right the state court was to be treated as a Federal court deriving its authority not from the State creating it, but from the United States"); see generally Bellia, Federal Regulation of State Court Procedures, 110 Yale L. J. 947, 970-92 (2001).

[12] See *Johnson* v. *Fankell*, 520 U.S. 911, 919 (1997) (relying upon Professor Hart's observation); *Howlett*, 496 U.S., at 372 (same).

The first exception holds that a state court must apply federal procedures that are "part and parcel of the remedy afforded" under federal law. *Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 362 (1952) (quoting *Bailey* v. *Cent. Vermont Ry.*, 319 U.S. 350, 354 (1943)). The right to be excused from procedural default, however, is hardly part and parcel of Medellin's federal treaty rights. Indeed, this Court has held—with the concurrence of the United States—that the Vienna Convention does not supersede procedural default rules. *Sanchez-Llamas*, 126 S.Ct., at 2669. And it is clear that such rules would block Medellin's claim if it were brought in federal court. Medellin's federal rights under the treaty were fully satisfied by the opportunity to raise those rights at trial.

The second exception is that particular state procedures may be preempted if they unduly burden particular federal rights. In *Felder* v. *Casey*, 487 U.S. 131 (1988), this Court held a state notice-of-claim statute for suits against state or local officials to be preempted as to federal suits under 42 U.S.C. §1983 (1996). But *Felder* made clear that its holding did not abrogate the general rule that state courts may decline to hear federal claims on the basis of neutral and generally applicable rules of procedure. See 487 U.S., at 141-142.[13]

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[13] The Court explained:

> "Nor is this condition a neutral and uniformly applicable rule of procedure; rather, it is a substantive burden imposed only upon those who seek redress for injuries resulting from the use or misuse of governmental authority. Second, the notice provision discriminates against the federal right. While the State affords the victim of an intentional tort two years to recognize the compensable nature of his or her injury, the civil rights victim is given only four months to appreciate that he or she has been deprived of a federal constitutional or statutory right."

Id. This Court emphasized that discrimination was key to *Felder*'s holding in *Johnson*, 520 U.S., at 918, n.9. It was also crucial in *Felder* that the state rule in question would not apply if the 1983 claim had been brought

There is no serious argument that the state's procedural default rule is in conflict with federal policy here: it mirrors the federal rule, the U.S. has taken the position that it legitimately applies, and in fact the U.S. has acted to protect such rules for all future cases by withdrawing from the ICJ protocol.

This well-established line of cases suggests that an attempt by *Congress* to require the state courts to disregard neutral and generally applicable restrictions on their jurisdiction would raise serious constitutional questions. But the President's power is even narrower than Congress's. After all, the Executive ordinarily may not even bring suit in a court that already has jurisdiction without Congressional authorization. See *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 285 (1888). There is no precedent for executive authority to commandeer the state courts and require them to exercise jurisdiction that they do not otherwise possess.

B. The President May Not Direct the State Courts to Decide a Particular Issue in a Particular Case in a Particular Way.

The availability of review is a crucial issue in every collateral attack upon a prior judgment of conviction. State courts decide this question by applying their own rules of procedural default and any other constraints on collateral attack under state law. The President's memorandum, however, reaches into a narrow set of particular cases—those involving the *Avena* prisoners—and directs the state courts to resolve any questions concerning the availability of review of those prisoners' Vienna Convention claims in favor of

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in federal court. See 487 U.S., at 141. Here, of course, the federal courts apply an identical procedural default rule, which the President has not sought to disturb.

review.[14] This dramatic and unprecedented intrusion on judicial independence violates this Court's stricture that even Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

The reach of *Klein* is notoriously ambiguous, but this Court stated the key limiting principle in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). *Robertson* upheld a statute providing that particular actions by the Bureau of Land Management, which had been challenged in pending litigation specifically mentioned in the statute, satisfied the relevant statutory requirements. The key point, the Court said, was that the new statute "compelled changes in law, not findings or results under old law." *Id.*, at 438. The President's memorandum, on the other hand, does not purport to change the underlying law in any way.

This case is substantially easier than *Klein* or *Robertson* in at least three respects. First, the directive to the courts in this case is not contained in a statute, executive order, or any other measure that even purports to be of general applicability. Second, the actor is the President rather than Congress. Unlike Congress, the President has no independent or delegated authority to change the underlying law governing these cases in the general way required by *Robertson*. Third, the President has attempted to direct a resolution of the relevant cases under *state* law, not federal law. If it were otherwise, Medellin could have sought review and reconsideration in the federal courts as well as the state courts. Instead, the state courts are obliged to construe their *own* rules governing collateral review in such a way as to

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[14] Although the President has not directed the state courts to grant a new trial, there is no reason in principle that he could not do so under the United States' theory. That would merely require directing the outcome of two issues—the availability of review plus the existence of prejudice arising from the Vienna Convention violation—rather than one.

permit review and reconsideration. But even if the national government has the authority to preempt those rules by promulgating a contrary general federal rule of decision, it has not done so here. Even this Court, of course, cannot direct the state courts to construe state law in a particular way. *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

Klein and *Robertson* did turn on the integrity of the federal judicial power protected under Article III, and one might argue that the Constitution affords no similar guarantee for the integrity of the *state* judicial power. That argument would, in our view, be profoundly mistaken.[15] The Constitution conferred no explicit power upon Congress to interfere with proceedings in the state courts. Under the Madisonian Compromise, the Framers left Congress the choice whether to establish lower federal courts, and in fact Congress chose not to confer general original jurisdiction over federal questions on those courts until 1875. Under these circumstances, most federal issues were presumptively litigated in the state courts in the first instance, and the integrity of those proceedings against political branch interference would have been of no less importance than the

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[15] As this Court observed in *Alden* v. *Maine*, 527 U.S. 706, 752-753 (1999), "[i]t would be an unprecedented step . . . to infer from the fact that Congress may declare federal law binding and enforceable in state courts the further principle that Congress' authority to pursue federal objectives through the state judiciaries exceeds not only its power to press other branches of the State into its service but even its control over the federal courts themselves. The conclusion would imply that Congress may in some cases act only through instrumentalities of the States." See also *Helvering* v. *Gerhardt*, 304 U.S. 405, 415 (1938) (describing "the establishment of the judicial department" as one of the "sovereign and reserved rights" rights of the States: "[w]ithout this power, and the exercise of it . . . no one of the States under the form of Government guaranteed by the Constitution could long preserve its existence") (quoting *Collector* v. *Day*, 78 U.S. (11 Wall.) 113, 126 (1970)).

integrity of proceedings in the federal district and circuit courts. Moreover, this Court has suggested that it may only review on appeal decisions that have the requisite integrity to be "judicial judgments." *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, 698-699 (1927). If the state judicial power were somehow more open to political branch interference than the federal one, this Court would have had to grapple with the implications of that difference for its ability to review state court judgments in federal question cases. Finally, over 200 years of statutes and doctrine—from the Anti-Injunction Act to *Murdock* to the abstention doctrines to the statutory and common law restrictions on *habeas* review—confirm the presumptive independence of the state courts from federal interference.

The truth is that nothing in the President's action or argument here is limited to cases in the state courts. If the President's say-so that a court must set aside rules barring collateral review has the force of federal law, then that law would bind both the state and federal courts. Nor is the President's asserted authority confined to cases in which his interference benefits the party asserting a federal right. If the President felt that a court had been overly solicitous of a prisoner's claims of prejudice from a Vienna Convention violation, for example, no reason appears why he might not require "review and reconsideration" of *that* result. To take an example only slightly further afield, it is hard to see why the President might not direct particular results denying review or relief in federal court cases involving suspected terrorists. The President's argument here is sweeping indeed, and it is impossible to tell where its principle stops.

C. The President May Not Require State Courts to Reopen Final Judgments.

The President's Memorandum required the Texas courts to reopen Medellin's conviction and sentence notwithstanding that the state court's judgment had become final. It is clear,

in the Article III context, that judicial judgments cannot be made subject to executive revision, see *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), and that final judgments may not be reopened by legislative command, see *Plaut*., 514 U.S., at 225-226. As we argued in the last section, the independence of the state courts from control by the federal political branches was no less central to the Founders' design than the independence of the Article III courts. The President is thus no more entitled to revise a final state court judgment than he would be to revise the judgment of a federal court.

This Court's opinion in *Plaut* is instructive on this score. That opinion cited numerous authorities from the Founding period and the early republic for the general proposition that political-branch interference was inconsistent with the very nature of judicial power. See *id*., at 219-225. The principles discussed were not unique to Article III, and many of the references were to state judgments.[16] The Court concluded that finality is intrinsic to the very notion of judicial power of which Article III is but an instance: "'a judgment conclusively resolves the case' because 'a judicial Power is one to render dispositive judgments.'" *Id*., at 219 (quoting Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 926 (1990)). All of the reasons for respecting the integrity of state judgments canvassed in the preceding section support this conclusion.

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[16] *Id*. (citing *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798) (discussing Connecticut judgments); *Lewis* v. *Webb*, 3 Greenleaf 326 (Me. 1825); *Bates* v. *Kimball*, 2 Chipman 77 (Vt. 1824); *Merrill* v. *Sherburne*, 1 N.H. 199 (1818); Judicial Action by the Provincial Legislature of Massachusetts, 15 Harv. L. Rev. 208 (1902); 5 Laws of New Hampshire, Including Public and Private Acts, Resolves, Votes, Etc., 1784-1792 (Metcalf ed. 1916); Vermont State Papers 1779-1786, pp. 531, 533 (Slade ed. 1823); Report of the Committee of the Council of Censors 6 (Bailey ed. 1784) (Pennsylvania)).

Habeas corpus is a limited exception to the finality of judgments in criminal cases. But the existence of *habeas* review does not mean that there is no constitutional protection for finality of state judgments. *Habeas* review is considered an exercise of appellate jurisdiction, see *Ex parte Bollman*, 8 U.S. (4 Cranch), at 101; it thus falls within *Plaut*'s recognition that appellate review by another judicial tribunal does not violate the principle of finality. See 514 U.S., at 227. In Medellin's case, by contrast, *habeas* review is concededly barred, and the *President* seeks to overturn the state court's judgment that it lacks jurisdiction. This executive intervention into the judicial process offends both *Hayburn* and *Plaut*.

Recognizing executive authority to reopen state court judgments would have far-reaching consequences. It would, for example, obviate the Article II's restriction of the President's pardon power to crimes against the United States. Moreover, there is no principled reason to confine the President's assertion of authority to reopen final judgments to the state courts or to judgments of conviction, as opposed to acquittal. The fact that the President seeks to use this broad power in the present case for the relatively benign purpose of satisfying an international court's judgment should not blind this Court to the implications of an executive power to reopen state or federal judgments whenever the interests of national security require it.

III. The President's Memorandum is Best Construed as Non-Binding.

This case raises fundamental questions of constitutional structure. But these questions only arise if the President's Memorandum is construed as a mandatory order purporting to bind the state courts to disregard limitations on their jurisdiction. The Memorandum simply does not say that: Its wording is consistent with the position that the President took

in *Breard*, which is that President has power under these circumstances to request action by state authorities but not to compel. This Court should adopt that construction and avoid the fundamental constitutional questions that would otherwise arise in this case.

If the President's Memorandum is an order, it is a very odd one. It is styled as a "MEMORANDUM FOR THE ATTORNEY GENERAL," and it is directed to an officer of the federal Executive, rather than to the state courts. The operative language consists of a single sentence:

> "I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."

Pet. App. 187a. This language does not *order* anyone to do anything; it creates no new legal obligations. It certainly does not purport to override Texas's rules or to confer new jurisdiction on the state courts. The text contemplates enforcement of the *Avena* decision in the same way that the Vienna Convention itself is enforced in this country: through the efforts of state and local law enforcement officials who come into contact with foreign nationals, without any federal implementing legislation creating further legal obligations. The wording of the Memorandum suggests that state courts should read the *Avena* decision and determine what "effect" it can be given, consistent with other applicable principles of state and federal law. Some state courts may determine that their *habeas* regimes permit them to grant the "review and reconsideration" directed by the ICJ; for instance, some of the *Avena* prisoners may not have defaulted their Vienna Convention claims or may still be on their first habeas petition.

Nothing in the Memorandum purports to *require* reconsideration when, as in Texas, state law limits the discretion of the state courts more strictly. Given that the United States Government has consistently argued that the application of federal and state procedural rules that may limit the right to raise Vienna Convention claims is valid and consistent with the treaty, it would be exceptionally odd to read the President's Memorandum as overriding those rules. Nothing in the Memorandum suggests that the Executive means to reverse the position it took in *Breard*, which was that the President has power under these circumstances to *request*, but not to compel. See Brief of United States in *Breard* v. *Greene*, at 51.

Any lingering doubt as to the President's meaning ought to be dispelled by his emphasis on "principles of comity"—principles which are, by definition, discretionary. See, *e.g.*, *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Ct.*, 482 U.S. 522, 543, n.27 (1987) ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."). The President surely knew that no court is free, on grounds of comity, to override a clear statutory constraint on its jurisdiction.

Multiple canons of construction favor this non-mandatory reading of the Memorandum. The Court has repeatedly held that "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Will* v. *Mich. Dept of State Police*, 491 U.S. 58, 65 (1989)). Similar canons disfavor reading ambiguous federal enactments to preempt state law, *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 448 (2005); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and mandate the "utmost caution" before construing federal law

to require a state court to hear federal claims notwithstanding "a neutral state rule regarding the administration of the courts." *Howlett*, 496 U.S., at 372. Most generally, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). This Court should exercise the same caution in construing the President's Memorandum.

Nor, finally, is the Department of Justice's interpretation of the Memorandum as mandatory entitled to deference. The Department is not construing its own rule or regulation, nor can there be any analogy to the deference ordinarily accorded an administrative agency's construction of a statute that it is charged to enforce. See *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). There is no delegation of authority to Department of Justice to enforce the Vienna Convention or the Memorandum, let alone of authority to issue binding interpretations of those measures. See *United States* v. *Mead Corp.*, 533 U.S. 218, 229-230 (2001). Nor is the deference sometimes accorded to Executive interpretations in the realm of foreign affairs appropriate here, because the Department of Justice is not the agency that negotiated the Vienna Convention or that is charged with overseeing its implementation of the Vienna Convention. That agency, of course, is the Department of State. Courts have been especially reluctant to defer to executive agency interpretations of law when those interpretations are embodied not in a formal rule or regulation, but instead in a litigation position embodied in a brief. See *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996) ("Of course we deny deference to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.") (quoting *Bowen*

v. *Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)). That hesitance is especially appropriate here, where the DOJ's current position on whether the President has constitutional *authority* to issue a mandatory order to the state courts directly contradicts the position that it took in 1998 in the *Breard* case. Brief of United States in *Breard* v. *Greene*, at 51.

CONCLUSION

The Court should affirm the decision of the Texas Court of Criminal Appeals.

Respectfully submitted,

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